

DRAFT: August 2, 1999
CALIFORNIA CODE OF REGULATIONS
TITLE 20 PUBLIC UTILITIES & ENERGY
DIVISION 2 ENERGY COMMISSION
CHAPTER 5.5 PUBLIC INTEREST ENERGY RESEARCH (PIER) PROGRAM
ARTICLE 2 COMPETITIVE NEGOTIATIONS

Section 2110 DEFINITIONS

- (a) "Bidder" shall mean any person or entity attending a Bidder's Conference or participating in any part of the CNS process;
- (b) "Bidder's Conference" shall mean the meeting conducted by the Commission after release of the CNS open to all potential Bidders for the purpose of asking questions about the CNS;
- (c) "Commission" shall mean the California Energy Commission and/or its staff;
- (d) "Competitive Negotiation Solicitation" or "CNS" shall mean the competitive negotiations bid process described in these regulations;
- (e) "Confidential Meeting" shall mean the private meeting between Bidder and the Commission regarding a Discussion Proposal;
- (f) "Discussion Memorandum" shall mean the written document prepared by the Commission memorializing the discussion during a Confidential Meeting;
- (g) "Discussion Proposal" shall mean a proposal submitted according to the requirements set forth in section 2116;
- (h) "Final Proposal" shall mean a proposal submitted according to the requirements set forth in section 2117;
- (i) "PIER" shall mean the Public Interest Energy Research, Demonstration and Development Program, established pursuant to AB 1890 (1996) and SB 90 (1997);
- (j) "Proposal" includes a Discussion Proposal or Final Proposal.

Section 2111 INTENT & OVERVIEW OF COMPETITIVE NEGOTIATION SOLICITATION

- (a) The Commission may use the CNS process in any of the situations described in Public Resources Code section 25620.5(c);
- (b) The intent of the CNS process is to provide an alternative competitive bidding process for research and development solicitations for PIER projects. The CNS differs from a traditional Request for Proposal, in that the CNS provides a mechanism for the Commission to have discussions with Bidders on the content of each Discussion Proposal in an effort to create a fully responsive Final Proposal. The Commission has the discretion to decide the appropriate screening, evaluation and selection criteria for each CNS;
- (c) In the CNS process, the Commission may include in the CNS an option or requirement for Bidders to submit one or more Discussion Proposals before the Final Proposal, as needed for the specific technical requirements of the solicitation. For each Discussion Proposal the following process is employed:
 - (i) The Commission evaluates the Discussion Proposal, without assigning a numerical score;
 - (ii) The Commission prepares a discussion agenda, which details the areas in the Discussion Proposal that are not responsive to the requirements in the CNS and where it can be improved;
 - (iii) The Bidder and Commission have a Confidential Meeting, giving the parties an opportunity to negotiate the Discussion Proposal(s);
 - (iv) The Commission prepares and sends to Bidder a Discussion Memorandum memorializing

the discussion during the Confidential Meeting;

(d) The process outlined in subdivision (c) would be repeated for each Discussion Proposal in the CNS.

Section 2112 BIDDER'S CONFERENCE & REQUEST FOR CNS CLARIFICATIONS/CHANGES

- (a) If Bidders have questions regarding the CNS, Bidders have the option to submit a formal written request for clarifications about the CNS. If Bidders believe one or more of the CNS requirements is onerous, unfair or imposes unnecessary financial or other constraints, Bidders also have the option to submit a formal written request to change the CNS. The identity of the Bidder making any request for clarification/change shall be kept confidential;
- (b) If a Bidder has made a request for clarifications or change to the CNS pursuant to subdivision (a), the Commission shall hold a Bidder's Conference. If no such request has been made, the Commission may hold a Bidder's Conference.
- (c) If the Commission holds a Bidder's Conference, the Commission shall notify all parties who requested a copy of the CNS regarding the date, time and place of the Bidder's Conference. The Commission shall specify in the CNS whether the Bidder's Conference is optional or mandatory for prospective Bidders. If the Bidder's Conference is mandatory, Bidders must attend in order to be able to participate in the CNS process;
- (d) At the Bidder's Conference, Bidders may raise any additional questions not already submitted pursuant to subdivision (a);
- (e) The Commission shall answer the requests at the Bidder's Conference orally and after the Bidder's Conference in writing;
 - (i) If the request was for clarification, the answer shall explain the clarification;
 - (ii) If the request was for change, the answer shall state either why a requested change is not appropriate, or, that the Commission shall issue an addendum based on the information contained in the request for change;
- (f) After the Bidder's Conference, the Commission shall provide written answers to all questions and requests for clarification/changes submitted or questions presented at the Bidder's Conference. If the Bidder's Conference was mandatory, the answers shall be sent only to Bidders who attended the Bidder's Conference. If the Bidder's Conference was optional, the answers shall be sent to all parties who requested a copy of the CNS;
- (g) Oral answers given at the Bidder's Conference shall not be binding.

Section 2113 POSSIBLE MODIFICATION/ADDENDA TO CNS

- (a) The Commission has the right to modify the CNS at any time before Final Proposals are due, by issuing an addendum to the CNS;
- (b) If changes are necessary to the CNS as a result of a request for clarifications or changes, the Commission shall modify the CNS by issuing an addendum to the CNS.

Section 2114 NOTICE OF INTENTION TO BID

- (a) In order to screen Bidders for eligibility, the Commission may include in the CNS a requirement to submit a Notice of Intention to Bid. If the Notice of Intention to Bid is used, Bidders shall submit the Notice of Intention to Bid in order to be able to submit any Proposal responsive to the CNS. Future written communication from the Commission shall be delivered only to those Bidders who submit a Notice of Intention to Bid.
- (b) Bidders may withdraw or modify a Notice of Intention to Bid at any time before the due date for the Notice of Intention to Bid.
- (c) The Notice of Intention to Bid shall include, at a minimum, the following:
 - (i) Identify how the project will meet the requirements of the CNS;
 - (ii) Identify team that will participate in Confidential Meetings;
 - (iii) Confidentiality statement, the form of which shall be provided in the CNS, regarding use of confidential information during the CNS process.
- (d) The CNS shall state any other requirements of the Notice of Intention to Bid. These requirements may include, without limitation, the following:
 - (i) Bidder's general qualifications;
 - (ii) Bidder's technical qualifications;
 - (iii) Financial measures such as net present value;
 - (iv) Capabilities of team as related to scope of work detailed in the CNS;
 - (v) Proof of financial ability to perform an awarded contract, including without limitation, financial statements, credit rating, liquidity ratios, equity ratio, equity rating and previous bankruptcy of Bidder, if any. If Bidder wants financial information to be kept confidential, Bidder must make a request for confidentiality pursuant to 20 section CCR 2501 *et. seq.* (See section 2125 regarding confidentiality requests).
 - (vi) Signed acceptance of the terms and conditions of the contract, if awarded.
- (e) In the CNS, the Commission shall specify a deadline for the Notice of Intention to Bid.
- (f) The Commission shall screen Bidders on specific criteria detailed in the CNS. The Notice of Intention to Bid may be scored numerically;
- (g) The Commission shall notify Bidders of whether the Bidder shall be permitted to continue in the CNS process and submit Proposals:
 - (i) If the Commission determines that the Bidder is not eligible to receive an award under the CNS, and that such ineligibility cannot be cured within the deadline for Final Proposals, the Commission shall notify Bidder that it is disqualified from further submittals under the CNS. The Commission shall indicate the specific reasons why Bidder is disqualified. Such decision is a final administrative action. If a Bidder wishes to discuss this decision, the Bidder may request a meeting with the appropriate PIER subject area lead or designee, regarding why Bidder believes it should be considered eligible for a contract award.
 - (ii) If the Commission determines that the Bidder is eligible to compete for an award under the CNS, the Commission shall notify Bidder that it is eligible to receive an award under the CNS and it may submit the first Discussion Proposal.

Section 2115 DISCUSSION PROPOSAL PROCEDURES

- (a) The Commission may include in the CNS an option or a requirement to submit one or more Discussion Proposals.
- (b) Each Discussion Proposal shall employ an identical process outlined in this section.
- (c) If a Notice of Intention to Bid was used, only those Bidders who were not disqualified after the Notice of Intention to Bid are eligible to submit a Discussion Proposal.
- (d) Upon receipt of a Discussion Proposal, the Commission shall evaluate the Discussion Proposal for responsiveness to the CNS and the specific criteria detailed in the CNS. Discussion Proposals shall be not be given a numerical score.
- (e) The Commission shall schedule a Confidential Meeting with each Bidder.
- (f) The Commission shall prepare a discussion agenda for each Discussion Proposal and shall send it to Bidder before the Confidential Meeting. The discussion agenda shall correspond to the criteria in the CNS, and note where the Discussion Proposal is not responsive to the requirements in the CNS and where the Discussion Proposal can be improved.
- (g) The purposes of the Confidential Meeting are to ensure that the Bidder's Final Proposal will be responsive to the CNS and to give the parties an opportunity to negotiate the content of the Discussion Proposal.
- (h) Oral statements by either party during any portion of the Discussion Proposal process shall not obligate either party.
- (i) After the Confidential Meeting, the Commission shall send a response to each Bidder who participated in the Confidential Meeting:
 - (i) The response may take the form of a Discussion Memorandum, which memorializes agreements negotiated by the parties. The content of the Discussion Memorandum is binding on the Bidder. If the Bidder believes there is a discrepancy between the Discussion Memorandum and the content of the Confidential Meeting, the Bidder may request the Commission to change the Discussion Memorandum, which may be changed in the Commission's sole discretion.
 - (ii) If it appears that the Discussion Proposal cannot be restructured or changed in a reasonable time in order to become responsive to the CNS or fulfill the CNS criteria, and that further discussion would not likely result in an acceptable Final Proposal, the response shall detail why the Commission believes that Bidder is non-responsive to the CNS and is unlikely to receive an award. In such case, the Commission shall not accept any further Discussion Proposals or negotiations.
- (j) The CNS shall list deadlines for each Discussion Proposal, the Discussion Agenda, Discussion Memorandum and requests for change of the Discussion Memorandum.
- (k) The Commission shall not accept protests for Discussion Proposals. Only Bidders who have submitted a Final Proposal and who are not awarded a contract are eligible to file a protest pursuant to Section 2121.

Section 2116 DISCUSSION PROPOSALS: CONTENT

- (a) The purpose of a Discussion Proposal is to provide Bidders an opportunity for the Commission to identify any faulty or nonresponsive aspect of the Discussion Proposal and an opportunity for the parties to negotiate the contents of the Discussion Proposal.
- (b) Each Discussion Proposal shall include, at a minimum, the following:
 - (i) If a Notice of Intent was not used, the Discussion Proposal shall identify how the Discussion Proposal will meet the requirements of the CNS;
 - (ii) If Notice of Intent was not used, the Discussion Proposal shall identify team that will participate in Confidential Meetings;
 - (iii) If a Notice of Intent was not used, the Discussion Proposal shall include a confidentiality statement, the form of which shall be provided in the CNS, regarding use of confidential information during the CNS process;
 - (iv) List of confidential documents, the form of which shall be provided in the CNS, with existing confidential documents, data or intellectual property, and anticipated confidential deliverables or work product;
 - (v) Costs and complete budget.
- (c) The CNS shall state any other requirements of the Discussion Proposal. These requirements may include, without limitation, the following:
 - (i) Bidder's general qualifications;
 - (ii) Bidder's technical qualifications;
 - (iii) Financial measures such as net present value;
 - (iv) Capabilities of team as related to scope of work detailed in the CNS;
 - (v) Proof of financial ability to perform an awarded contract, including without limitation, financial statements, credit rating, liquidity ratios, equity ratio, equity rating and previous bankruptcy of Bidder, if any. If Bidder wants financial statements to be kept confidential, Bidder must make a request for confidentiality pursuant to 20 section CCR 2501 *et. seq.* (See section 2125 regarding confidentiality requests).
 - (vi) Proposal goals;
 - (vii) Proposal technical objectives;
 - (viii) Proposal economic objectives;
 - (ix) Matching funds amount and source, and date when matching funds become available;
 - (x) Contingency plan for loss of matching funds;
 - (xi) Evidence of compliance with state contract requirements such as Disabled Veterans Business Enterprise, or evidence of current progress toward meeting compliance with state contract requirements;
 - (xii) Complete work statement;
 - (xiii) Schedule with milestones of project tasks from start to end;
 - (xiv) List of anticipated deliverables, including monthly progress reports and final report;
 - (xv) Identification of preexisting intellectual property held by Bidder;
 - (xvi) Letters of support or reference;
 - (xvii) Projection of when royalty repayment would begin, if any;
 - (xviii) Commercialization plan for market adoption of technology.

Section 2117 FINAL PROPOSAL

- (a) All Bidders are required to submit a Final Proposal to be eligible to receive a contract award;
- (b) The CNS shall list the deadline for the Final Proposal;
- (c) The Final Proposal shall include, at a minimum, the following:
 - (i) All agreements and information noted in the Discussion Memorandum;
 - (ii) Negotiated changes from any and all Discussion Proposals;
 - (iii) Additional information as specified in the CNS;
 - (iv) Evidence of compliance with state contract requirements, such as Disabled Veterans Business Enterprise (DVBE), unless the requirements for DVBE participation have been changed or exempted pursuant to 2 CCR section 1896.62(b).
- (d) After the deadline for Final Proposals, no further Final Proposals will be accepted.
- (e) After the deadline for Final Proposals, no further discussions with the Commission will be permitted, unless such discussion is initiated by the Commission.
- (f) The following criteria may be used to score the Final Proposal:
 - (i) Proposal advances science or technology by providing benefits to California citizens;
 - (ii) Proposal is not adequately addressed by competitive and regulated markets;
 - (iii) Amount of Proposal costs;
 - (iv) Level of public and private benefits compared to Proposal costs to be funded by the PIER program and match funds;
 - (v) Overall quality of Proposal;
 - (vi) Overall quality of Bidder's team;
 - (vii) Likelihood of and timeframe for success of Proposal;
 - (viii) Technical, market and financial risks of Proposal;
 - (ix) Whether Bidder incorporated negotiated changes from any and all Discussion Proposals.

Section 2118 EVALUATION AND SELECTION PROCESS

- (a) During the evaluations of Discussion Proposals and during the scoring and selection of Final Proposals, the Commission may:
 - (i) Require Bidders to answer specific questions orally or in writing;
 - (ii) Require a demonstration of the Bidder's response to specific requirements in order to verify the claims made in the Proposal;
 - (iii) Visit a Bidder's business or plant site in order to fully evaluate the Proposal;
- (b) The Discussion Proposals will not receive evaluation scores. Final Proposals will be formally scored for contract award purposes;
- (c) Final Proposals shall be scored according to the procedures and standards as specified in the CNS by a minimum of three scorers chosen by the Commission;
- (d) Final selection will be among the Final Proposals that are responsive to the CNS requirements.

Section 2119 PROPOSED AWARDS OF CONTRACTS

After the deadline for Final Proposals, the Commission shall assign a rank order to each Final Proposal and shall make recommendations to the Research, Development & Demonstration (RD&D) Committee for proposed contract awards based on the highest scored Final Proposals. The RD&D Committee will make its proposed recommendation and post a Notice of Proposed Awards. There is no guarantee that any of the Bidders will receive contract awards. After the proposed contracts have been signed by the Bidders, the Commission will consider final approval of each contract at a publicly noticed Commission business meeting. More than one contract may be awarded by the Commission at that time.

Section 2120 DEBRIEFING

- (a) The Commission may provide debriefing information and/or hold a debriefing conference after contract award at the request of any unsuccessful Bidder for the purpose of receiving specific information concerning the selection of Bidders.
- (b) Debriefing is not the forum to challenge the CNS specifications or requirements, or challenge a contract award. See section 2121 for contract award protest procedures.

Section 2121 AWARD PROTEST

- (a) Contracts shall be awarded only after a notice of the proposed award has been posted at the Commission for five working days;
- (b) If, prior to contract award(s), any Bidder who submitted a Final Proposal files a protest with the Commission and with the Department of General Services, Office of Legal Services (DGS-OLS), the contract shall not be awarded until either the protest has been withdrawn or the protest has been resolved as described in this section. Protests should be submitted to the following:

Chief Counsel

Department of General Services, Office of Legal Services
1325 J Street, Suite 1911
Sacramento, CA 95814

Contracts Office, MS-18

California Energy Commission
1516 9th Street
Sacramento, CA 95814

- (c) Within five days after filing the protest, the protesting Bidder shall file with DGS-OLS, and with the Commission, a full and complete written statement specifying the grounds for the protest;
- (d) The grounds for filing a protest shall be limited to allegations that the Commission failed to properly follow the evaluation process detailed in the CNS, or in section 2118 or section 2124 of these regulations;
- (e) When a protest is filed, DGS-OLS shall notify those Bidders who were awarded contracts, and give them an opportunity to rebut the protest. Written rebuttal arguments shall be submitted to DGS-OLS within 10 days from the date of the notification;
- (f) DGS-OLS shall have the discretion whether to consider the protest and rebuttals based on written submissions alone, or written submissions and oral argument;
- (g) DGS-OLS shall make findings and a recommended decision within:
 - (i) 30 days after oral arguments, if any; or

- (ii) 30 days after the due date for rebuttal arguments if there are no oral arguments;
- (h) The Commission shall either approve or disapprove the recommended finding at the next possible publicly noticed Commission business meeting.

Section 2122 MODIFICATION OR WITHDRAWAL OF PROPOSALS SUBMITTED

Bidders may withdraw or modify a Proposal at any time before the deadline specified for that Proposal, by submitting a written request to withdraw or modify to the Commission.

Section 2123 RIGHT TO MODIFY CNS, CANCEL CNS OR REJECT PROPOSALS

The Commission reserves the right to modify any CNS as needed or to cancel any CNS. The Commission also reserves the right to reject any or all Proposals.

Section 2124 GROUND TO REJECT PROPOSALS

- (a) The Commission shall reject any Proposal (Discussion Proposal or Final Proposal) upon the occurrence of either of the following, without limitation. If a Bidder wishes to dispute the decision for a Final Proposal, the Bidder may file a protest pursuant to Section 2121.
 - (i) Any Proposal is received past the scheduled deadline; or
 - (ii) Any Proposal is labeled as confidential in its entirety;
- (b) The Commission shall also reject a Final Proposal upon the occurrence of any of the following, without limitation. If a Bidder wishes to dispute this decision, the Bidder may file a protest pursuant to section 2121.
 - (i) A Final Proposal is not responsive to Disabled Veteran Business Enterprise program requirements or any other state contracting requirement; or
 - (ii) A Final Proposal does not contain a properly executed Certification Clauses Package; or
 - (iii) A Final Proposal is not signed on the application form included in the CNS; or
 - (iv) A Final Proposal does not meet the eligibility, completeness and feasibility criteria specified in the CNS; or
 - (v) A Final Proposal does not meet the minimum passing technical score.
- (c) The Commission may reject any Proposal (Discussion Proposal or Final Proposal) upon the occurrence of any of the following, without limitation:
 - (i) Any Proposal contains false or misleading statements or references that do not support an attribute or condition contended by a competitor; or
 - (ii) Any Proposal does not comply with or contains caveats that conflict with the CNS; or
 - (iii) Any Proposal contains a conflict of interest pursuant to Public Contract Code sections 10410, 10411 or 10365.5; or
 - (iv) Any Proposal contains multiple projects within a single Proposal; or
 - (v) Any Proposal is not prepared in the required format described in the CNS.
- (d) If a Discussion Proposal is rejected for any of the grounds listed in subdivision (c), the Bidder shall be notified that the Discussion Proposal is not responsive to the CNS and Bidder is unlikely to receive an award. The decision regarding a Discussion Proposal is not immediately reviewable.
- (e) If a Final Proposal is rejected for any of the grounds listed in subdivision (c), the Bidder shall be notified that it did not receive a contract award. If Bidders wish to dispute this decision, Bidders may file a protest pursuant to Section 2121.

Section 2125 CONFIDENTIAL INFORMATION

- (a) The Commission shall not accept or retain any Proposal labeled as confidential in its entirety;
- (b) All Proposals and materials submitted with Proposals shall be kept confidential until the notice of proposed contract awards is posted;
- (c) All Proposals and materials submitted with Proposals become a public record after the notice of proposed contract awards is posted;
- (d) If a Bidder believes certain confidential or proprietary information is necessary for the evaluation of a Proposal, the Bidder may submit the information in a separate volume marked confidential with a request to keep such information confidential pursuant to 20 CCR sections 2501-2505.

Section 2126 CORRECTION OF ERRORS IN CNS

If a Bidder discovers any errors, conflicts or omissions in any CNS, the Bidder shall immediately notify the Commission in writing and request modification or clarification of the CNS. If any CNS contains an error known to a Bidder, or an error that reasonably should have been known, the Bidder submits Proposals at its own risk.

Section 2127 CONTRACT TERMS AND CONDITIONS

Standard contract terms and conditions shall be included with the CNS. No agreement between the Commission and a successful Bidder is in effect until a contract has been signed by both parties and approved by the Department of General Services, Office of Legal Services.

Section 2128 BIDDER'S PROPOSAL PREPARATION COSTS

The cost of developing and submitting a Notice of Intention to Bid or Proposal is the Bidder's responsibility and cannot be charged to the Commission or the state of California.

Section 2129 DISPOSITION OF PROPOSALS

The Commission shall exercise control over the circulation of all Proposals submitted pursuant to the CNS. All Proposals and materials submitted with Proposals shall become the property of the state of California. After posting of the notice of proposed contract awards, all Proposals, materials submitted with Proposals, evaluation sheets and scoring sheets shall become public records.

Section 2130 IMMATERIAL DEVIATIONS IN PROPOSAL

The Commission may waive any immaterial defect or deviation in any Proposal. Such waiver shall in no way modify the Proposal or excuse a successful Bidder from full compliance.

Section 2131 AUDITS

Contracts awarded under any CNS will be subject to audit by the Bureau of State Audits and the Commission or its representative at any time during the duration of the contract, but no more frequently than once every twelve months. In addition, financial information submitted prior to contract award is subject to audit.

Section 2132 JOINT BIDS

Bidders may submit a joint Proposal. In such case, the contract may be awarded as one indivisible, multi-party contract

Section 2133 BIDDER RESPONSIBILITY

Prior to award of the contract, the Commission must be assured that the Bidder selected has all of the resources successfully to perform under the contract. This includes without limitation, personnel in the numbers and with the skills required, equipment of appropriate type and in sufficient quantity, and financial resources sufficient to complete performance under the contract and experience in similar endeavors.

Section 2134 Additional Procedures

Additional procedures for administering these regulations and conducting a competitive negotiations solicitation may be identified in each CNS and/or a Commission instruction manual.